# KPM Khidmat Sdn Bhd v Tey Kim Suie

SUPREME COURT (PENANG) — CIVIL APPEAL NO 02-426-1992
GUNN CHIT TUAN CJ (MALAYA), EUSOFF CHIN AND MOHAMED DZAIDDIN SCJJ
26 MAY 1994

***Evidence*** *— Best evidence — Document — Summary of account extracted from record book — Book not tendered as evidence — Record book not shown to have been lost or destroyed — Whether summary of accounts admissible — Evidence Act 1950 s 65*

***Evidence*** *— Proof — Admissibility — Summary of account extracted from record book — Book not tendered as evidence — No objection taken to admission — Whether summary of accounts admissible*

The respondent brought an action against the appellant for the recovery of a sum of RM1,581,870.90 together with interest and costs, which the respondent claimed was the sum due to him for works done under certain agreements ('the agreements'). The respondent testified that after completing the works under the agreements, he submitted his claims by way of summary of accounts prepared by Ah Lian, a clerk. Apparently, the summary of accounts were taken from the respondent's own record book in which was recorded the actual work completed by him. He was however, unable to produce the book in court. Based on the above evidence of the respondent, there being no other supporting evidence except the summary of accounts, the judicial commissioner found on a balance of probability that the respondent had discharged the burden of proof of his loss and accordingly, entered judgment for the sum of RM1,581,870.90 with interest and costs.

**Held**, allowing the appeal:

(1) The judicial commissioner was wrong in law in relying on the summary of accounts prepared by Ah Lian, who was not called as a witness nor made available to the defendant. Moreover, the record book of the respondent, which was the source document upon which the summary of accounts was prepared, was never produced and the respondent had not been called to explain the facts and the basis of the calculation of the amount claimed.

(2) When documentary evidence is tendered, primary evidence of the said document must be adduced except if it can be shown that the original record had been lost or destroyed. The burden of proving that the record book had been lost or destroyed lies on the party seeking to adduce secondary evidence of the contents of the record book. This the respondent had not done.

(3) Here, although the appellant did not challenge the truth of the summary of accounts, the appellant never agreed to dispense with formal proof of the debt.

(4) Since the summary of accounts were inadmissible, the respondent could not rely on any documentary evidence to substantiate his claim. His claim therefore failed. A

[**Bahasa Malaysia summary**

Responden telah memulakan suatu tindakan terhadap perayu untuk mendapat balik jumlah sebanyak RM1,581,870.90 bersama dengan faedah dan kos, yang responden mendakwa merupakan jumlah yang terhutang kepadanya untuk kerja yang telah dibuat di bawah perjanjian tertentu ('perjanjian itu'). Responden telah memberi keterangan bahawa setelah menghabiskan kerja di bawah perjanjian itu, beliau telah membuat suatu tuntutan pembayaran melalui suatu akaun ringkas yang telah disiapkan oleh Ah Lian, seorang kerani. Kononnya, akaun ringkas itu telah diambil daripada buku rekod responden di mana telah direkodkan kerja sebenar yang telah dihabiskan olehnya. Akan tetapi, beliau tidak dapat mengemukakan buku itu di dalam mahkamah. Berdasarkan keterangan responden di atas, dan tidak terdapat keterangan menyokong yang lain kecuali akaun ringkas itu, pesuruhjaya kehakiman telah membuat keputusan atas imbangan kebarangkalian bahawa responden telah melepaskan beban membukti kerugiannya dan oleh itu, telah memasukkan penghakiman untuk jumlah sebanyak RM1,581,870.90 bersama faedah dan kos. B C D E

**Diputuskan**, membenarkan rayuan itu:

(1) Pesuruhjaya kehakiman telah membuat keputusan yang salah dari segi undang-undang apabila bergantung kepada akaun ringkas yang telah disediakan oleh Ah Lian, yang tidak dipanggil sebagai seorang saksi dan juga tidak diserahkan kepada defendan. Lebih-lebih lagi, buku rekod responden, yang menjadi dokumen asal dari mana akaun ringkas itu disiapkan, tidak dikemukakan dan responden tidak dipanggil untuk menerangkan fakta dan asas perhitungan amaun yang dituntut. F

(2) Apabila keterangan dokumentar dikemukakan, keterangan primer dokumen tersebut mesti dikemukakan kecuali jika boleh ditunjukkan bahawa rekod asal telah hilang atau telah dimusnahkan. Beban membukti bahawa buku rekod itu telah hilang atau dimusnahkan terletak pada pihak yang hendak mengemukakan keterangan sekunder mengenai kandungan buku rekod itu. Responden tidak berbuat demikian. G H

(3) Di dalam kes ini, walaupun perayu tidak mempertikaikan kebenaran akaun ringkas itu, perayu tidak pernah bersetuju supaya bukti formal hutang itu diketepikan.

(4) Memandangkan bahawa akaun ringkas itu tidak boleh diterima, responden tidak boleh bergantung kepada sebarang keterangan dokumentar untuk mengesahkan tuntutannya. Oleh itu, tuntuannya semestinya gagal.] I

**Notes**

For cases on best evidence, see 7 *Mallal's Digest* (4th Ed) paras 92–96.

**Cases referred to**

1 *Petlad Turkey Red Dye Works Ltd v Dyes & Chemical Workers' Union, Petlad & Anor* [1960] 2 SCR 906 (refd)
2 *Krishnakishori v Kishori* 14 IA 71; 14 C 486 (refd)
3 *Bhubaneswari v Harisaran* 6 C 720 (refd)
4 *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 (refd)

**Legislation referred to**

Evidence Act 1950 s 65(1)

**Appeal from**: Civil Suit No 207–1983 (High Court, Alor Setar)

*K Anantham* (*Mubashir bin Mansor* with him) (*Skrine & Co*) for the appellant.

*Francis Nathar* (*Francis Nathar & Co*) for the respondent.

*Cur Adv Vult*

**Mohamed Dzaiddin SCJ** (delivering the judgment of the court): This is an appeal from the decision of the High Court, Alor Setar in a money claim for works done in the clearing, terracing, construction of field roads, etc, of estate land under five agreements entered into between the appellant and the respondent in 1979 and 1980.

By a writ of summons and the statement of claim filed on 21 March 1984, the plaintiff, who is now the respondent, alleged that the appellant company was indebted to him in the sum of RM1,581,870.90, being the balance of the amount due to him for works done pursuant to five agreements dated 30 June 1979, 12 January 1980, 15 June 1980, 1 August 1980 and 1 October 1980, respectively ('the said agreements'), particulars whereof had been rendered to the defendant company. By a notice in writing dated 5 March 1983, the respondent's solicitors demanded payment of the aforesaid sum which the appellant had failed to comply with. Wherefore, he prayed for judgment in the sum of RM1,581,870.90 with interest and costs.

By the re-amended defence, the appellant denied owing the respondent the aforesaid amount and contended that subsequent to the agreement which it entered into with one Hj Ariffin bin Hj Ismail on 1 January 1980 appointing the latter as its adviser, all payments and advances under the said agreements were made by the said Hj Ariffin to the respondent. These payments were debited to the appellant who then reimbursed the said Hj Ariffin. The appellant averred that the said arrangement was acquiesced and agreed to by the respondent and from 1 January 1980, all payments were made accordingly until December 1984 when the appellant rescinded the said arrangement which was expressly consented to by the respondent. In the circumstances, the appellant contended that the respondent was

estopped from making any claims against the company on the ground of his acquiescing and agreeing to the said arrangement. A

It is trite law that the burden of proving the loss, which in this appeal is the actual amount for works done, is on the respondent. In this regard, it is of utmost importance to summarize the evidence of the respondent in the court below. He testified that after he had completed the works for the five estates, he submitted his claims by way of summary of accounts (at pp 117–121 of the appeal record) which was prepared by one Ah Lian, a clerk working at Sungai Patani who had some experience in preparing accounts for other people. Apparently, the summary of accounts were taken from the respondent's own record book in which was recorded the actual work completed by him for the five estates under the said agreements. Unfortunately, he was unable to produce the book in court which he claimed he did not know its whereabout due to long lapse of time. Based on the above evidence of the respondent, there being no other supporting evidence except the summary of accounts, the learned judicial commissioner found on a balance of probability that the respondent had discharged the burden of proof of his loss and accordingly entered judgment for the balance sum of RM1,581,870.90 with interest and costs. B C D

In his grounds of decision in Bahasa Melayu, the learned judicial commissioner gave the following reasons (at pp 19–20 of the appeal record):

> Jumlah tuntutan E
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> Plaintif membuat jumlah besar sebanyak RM3,666,603.10 menurut penyata akaun yang dibentangkan di ms 43–47 Ikatan A yang mana defendan telah menjelaskan sebanyak RM2,084,704.80 menurut penyata akaun yang dibentangkan di ms 48–49 Ikatan A. Baki sebanyak RM1,581,898.30 belum dijelaskan dan notis desakan telah dihantar pada 5 Mac 1983 oleh peguam plaintif kepada defendan menuntut bayaran sebanyak RM1,581,870. *Plaintif mengemukakan penyata akaun yang disediakan oleh seorang bernama Ah Lian yang menyalinnya dari rekod yang ditulis oleh plaintif dalam buku catitan yang dirujuk di mahkamah tetapi tidak dikemukakan sebagai ekshibit. Saya dapati tanpa keterangan defendan yang boleh mencabar kesahihan penyata akaun plaintif saya berpendapat penyata akaun itu boleh diterima dan dikira benar.* Saya diingatkan adalah beban plaintif untuk membukti tuntutannya, tetapi pembuktian itu adalah atas imbangan kebarangkalian. Saya terima keseluruhan keterangan plaintif walaupun plaintif akui terdapat sedikit kesilapan di sana sini dalam penyata akaun itu. (Emphasis added.) F G

Before us, the appellant raised seven grounds of appeal. However, one of the grounds which arose directly from the above passage of the decision of the learned judicial commissioner was to the effect that the learned judicial commissioner was wrong in fact and in law in holding that the respondent had discharged the burden of proving loss and quantum of loss. Encik Anantham, counsel for the appellant, submitted that the learned judicial commissioner was wrong to rely on the summary of account for works done (at pp 117–121 of the appeal record) as evidence supporting the respondent's claim. Counsel stated that as the record book of the respondent, which was the source of the summary of accounts, was never produced nor properly explained as to why it could not be produced, the oral evidence of the H I

respondent pertaining to the particulars of his claim and upon which the summary of accounts were prepared was therefore inadmissible. Hence, the respondent had failed to discharge the burden of proving his loss.

To recapitulate, on the evidence of the respondent, the learned judicial commissioner found the respondent had discharged the burden of proving the debt due from the appellant on the basis of the summary of accounts (at pp 117–121 of the appeal record) prepared by Ah Lian which she collated from the record book kept by the respondent, detailing the works done and completed by him, although the said book was never produced in court. He further held that in the absence of the appellant's evidence challenging the truth of the summary of accounts, the latter could be, and indeed, was admitted as a true statement of account for works done to found a claim for the respondent.

We agree with counsel's submission that the learned judicial commissioner was wrong in law in relying on the summary of accounts (at pp 117–121 of the appeal record) prepared by Ah Lian, who was not called as a witness nor made available to the defendant. Moreover, the record book of the respondent, which was the source document upon which the summary of accounts was prepared, was never produced. It is a well-established rule of evidence that when documentary evidence is tendered, primary evidence of the said document must be adduced except in the cases under s 65 of the Evidence Act 1950. According to *Sarkar on Evidence* (14th Ed, 1993) at p 961, when a given matter has been expressed in writing, the primary evidence of it is the writing itself and subject to the provision of s 65, the writing, unless admitted by the other side, must be produced if it is desired to prove the matter expressed in it. On the question of a balance sheet, the Indian Supreme Court, in *Petlad Turkey Red Dye Works Ltd v Dyes & Chemical Workers' Union, Petlad & Anor*,[1] has held that a balance sheet does not by itself prove the facts stated therein. It has to be proved like any other fact by affidavit or otherwise. Das Gupta J, delivering the judgment of the court, stated (at p 909):

> All that the balance sheet, as submitted, shows is that certain statements were made. The mere fact that the statements were made can never be taken as proving that the statements were correct.
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> That is a distinction which the courts of law have always been careful to make. Thus, if a person is to prove that he was ill on a particular date, the mere filing of a certificate of a medical man that he was ill on that date is not accepted as evidence to show that he was ill. The correctness of the statement made in the certificate has to be proved by an affidavit or oral testimony in court by the doctor concerned or by some other evidence. There is no reason why an exception should be made in the case of balance sheets prepared by companies for themselves. It has to be borne in mind that in many cases the directors of the companies may feel inclined to make incorrect statements in these balance sheets for ulterior purposes. While that is no reason to suspect every statement made in these balance sheets, the position is clear that we cannot presume the statements made therein to be always correct. The burden is on the party who asserts a statement to be correct to prove the same by relevant and acceptable evidence.

Likewise, in the instant case, the summary of accounts does not prove the facts and particulars stated therein. The mere fact that the summary of the

particulars were made could never be taken as proving that the contents were correct. It has to be proved by calling the maker to explain the facts and the basis of the calculation of the amount claimed. Moreover, the record book upon which the maker based her summary must be in evidence. In this case, where the summary was based on the record kept by the respondent, such record must be produced except if it can be shown that the original record is lost or has been destroyed. The burden of proving that the record book is lost or destroyed lies on the party who is seeking to adduce secondary evidence of the contents of the record book. (See s 104 illustration (b) of the Evidence Act 1950). Here, the evidence of the respondent on the matter is as follows (at p 56 of the appeal record):

> Saya catat dalam buku akaun mengikut kerja sebenar di estate. Mungkin ada sedikit tak sama catatan saya ada lebih. Ah Lean sediakan kira-kira mengikut buku saya. Buku ini tidak catatkan kerja yang saya telah sediakan. Saya ada buku lain yang catatkan kerja saya tapi sudah lama saya tak tahu di mana buku itu. Rekod itu saya sendiri buat.

In order for the court to rely on the summary of accounts (at pp 117–121 of the appeal record), the respondent must satisfy the court that his record book was lost to enable secondary evidence relating to the said book to be given. The relevant part of s 65(1) states:

> Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:
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> ...
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> (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect produce it in reasonable time;
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> ...

On the principle and scope of s 65, we respectfully rely on the commentary in *Sarkar on Evidence* (at p 964–965):

> It has been seen that the contents of a document must be proved by the production of the original document and secondary evidence of it is not generally admissible (s 64). There are exceptions to the rule and this section states the various class of cases in which secondary evidence relating to documents may be given. The principle is that so long as the original exists and is available, it being the best evidence, must be produced. If it cannot be had on account of its loss, destruction, detention by the opponent, or third person who does not produce after notice, physical or legal irremovability, or any other cause, secondary evidence is admissible. Porter J, in *Thomas v T* 1 La 166 at p 168:
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> > '[The rule] is only another form of expression for the idea that when you lose the higher proof, you may offer the next best in your power ... The rule does not mean that men's rights are to be sacrificed and their property lost because they cannot guard against events beyond their control; it only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to that.'

At p 966, it is further stated:

> [But] secondary evidence of an ordinary document is admissible only when the party desirous of admitting it has proved that he has not possession or control of it and further that he has done what can be done to procure the production of it. He has to account for the non-production in one of the ways indicated in this section [*Krishnakishori v Kishori* 14 IA 71, 14 C 486; *Shambati v Jogo* 29 C 749; *Bhubaneswari v Harisaran* 6 C 720]. When original account books are available copies are not admissible [*Jainarain v Zubeda* A 1972 A 494].
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> Exceptions (a) and (c) rest upon the principle that a party tendering a copy has done all that lies in his power to produce the original.

Thus, basically, secondary evidence of the contents of a document is inadmissible, until the non-production of the original is first accounted for, so as to bring it within one or other of the cases provided for in the section (*Krishnakishori v Kishori*;[2] and *Bhubaneswari v Harisaran*[3]).

In the present case, based on the evidence of the respondent which we have highlighted above, we are satisfied the respondent had not shown that the non-production of the record book had been satisfactorily accounted for so as to bring it within s 65(1)(c) of the Evidence Act 1950. The respondent had also led no evidence to suggest that the non-availability of his record book was through no fault of his.

From the record, it would seem to us that the appellant's counsel in the court below did not dispute the contents of the summary of accounts (at pp 117–121 of the appeal record). The learned judge held that as the appellant did not challenge the truth of the summary of accounts, he was of the view that the contents were true and admissible despite the fact that the appellant never agreed to dispense with formal proof of the debt. On this issue, we were referred by counsel to the decision of Edgar Joseph Jr J in *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd.*[4] The learned judge addressed the issue in the following manner (at p 368):

> Now, it was alleged by the plaintiffs that both the oral testimony of the accountant Mr So (regarding their financial operations) and the statement P76 prepared by him, were based upon the results of his examination of the accounts books of the plaintiffs for the relevant period. However, the accounts books themselves were never produced and the defendants never dispensed with formal proof of the loss of profits alleged or at all. In my opinion, the result of this glaring omission, was to render such oral evidence of Mr So and P76 inadmissible in evidence and it makes not the slightest difference that Mr and Mrs Segal confirmed the accuracy of P76. I take the law on this point to be correctly stated by the Vice-Chancellor in *Johnson v Kershaw* 63 ER 1059. In that case, the evidence of an accountant was tendered containing the results of his examination of certain partnership books, but the accounts books themselves upon which he based his statement were not in evidence. The Vice-Chancellor said:
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> > 'If the account books had been in evidence, the accountant's statement of the results of his examination of those books, as the evidence of a person of skill, might be receivable; but, inasmuch as the books were not in evidence, I must decline to receive the deposition of Mr Peet as to their contents.'

That case commended itself to Dixon J in *Potts v Miller* (1940) 64 CLR 282 at p 303.

Nor, does it make any difference that counsel for the defendants never called for production of the accounts books, since the defendants never agreed to dispense with formal and proper proof of the loss of profits (see *Guan Soon Tin Mining Co v Ampang Estate Ltd* [1973] 1 MLJ 25 at p 30).

We would adopt with gratitude the above statement of the law to the present case.

Looking at the matter as a whole, we have come to the conclusion that the learned judicial commissioner was wrong in relying on the summary of accounts (at pp 117–121 of the appeal record) as sufficient proof of the debt due to the respondent bearing in mind that the burden of proof always lies on the respondent to prove his claim. We hasten to add that since the summary of accounts is inadmissible for reasons which we have adverted to above, it is our further conclusion that as there is no documentary evidence before the court which the respondent can rely to substantiate his claim, his case against the appellant must accordingly fail. Moreover, his oral evidence regarding the works undertaken in the five estates was most unsatisfactory. He never submitted the particulars of works to the appellant, but merely relied on the summary of works as in pp 117–121 of the appeal record. Therefore, based on the above grounds, the appeal must be allowed with costs here and below. The judgment of the learned judicial commissioner is set aside. Lastly, we order the deposit of the appeal be refunded to the appellant.

*Appeal allowed.*

Reported by Prof Ahmad Ibrahim